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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. ..379..

HAROLD G. FREUND,
Petitioner,

v.

GULF, MOBILE AND OHIO RAILROAD COMPANY,
a Corporation,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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STATEMENT.

On January 3, 1947, petitioner became stalled in his automobile on respondent's railroad grade crossing (R. 19). The automobile became stalled because of insufficient ballast between the rails at the point where petitioner had attempted to drive across the tracks (R. 14). Weather conditions limited his visibility to 600 to 700 feet (R. 25). He knew that trains sometimes reached the crossing at that time of day (R. 26). Respondent's train approached the

crossing at a speed of 38 to 40 miles per hour (R. 34, 45, 47), while petitioner was attempting to start his automobile and proceed across the tracks. He did not see the train until it was 150 feet from him, and he was unable to get out of the automobile before it was struck by the train, resulting in the injuries for which he filed this suit (R. 19, 20).

The jury returned a verdict in favor of petitioner (R. 64). The United States Court of Appeals for the Eighth Circuit reversed the judgment outright holding that petitioner was guilty of contributory negligence as a matter of law and that his contributory negligence barred recovery, because the evidence could not support a finding that respondent was guilty of wilful and wanton misconduct in the maintenance of the crossing nor in the operation of the train (R. 88).

ARGUMENT.

I.

On pages 18 and 19 of his brief petitioner has alleged that the Lower Court (Court of Appeals for the Eighth Circuit) misinterpreted the facts on four occasions. We will consider those separately.

a. Petitioner complains that the Lower Court assumed that the portion of the crossing where he became stalled was the "shoulder" of the road.

The evidence showed that the center of the road was paved and that the outer edge, over which plaintiff traveled in order to get better traction, was gravel. The Lower Court used the term "shoulder" only as a convenient description but did not hold that the "shoulder" was not part of the traveled portion.

Actually, any misinterpretation which there may have been is of no consequence, because the Lower Court conceded that respondent failed to maintain the crossing in accordance with the state statute but held that the failure established nothing more than respondent's negligence and did not establish wilful and wanton misconduct, which was the real issue of law on that phase of the case.

b. Although the Lower Court may have been incorrect in stating that petitioner "knew that trains frequently reached the crossing at the same time"; still in considering the applicable law it is sufficient that petitioner knew that "sometimes" a train came at that hour (R. 26). "Sometimes" instead of "frequently" was still notice to petitioner that he could expect a train to appear.

c. The witness who said, "I have bumped over those four ties" also said, "I have never had any difficulty that

I know of in crossing there in the 16 years that I have driven over it [the crossing]" (R. 32), and the Lower Court was correct in stating that there was no evidence that any other person had experienced any difficulty in driving over the crossing (R. 81).

d. The Lower Court did not state that the crossing was constructed and maintained in fair compliance with the statute, but instead the Lower Court applied that description only to "the paved portion of the road, the part usually traveled by motorists" (R. 82), and conceded that respondent had failed to maintain the "crossing" in compliance with the statute (R. 83).

Petitioner also complains that the Lower Court erroneously assumed that petitioner could not have heard a warning had it been sounded (Petitioner's Brief, p. 19). The Lower Court did not draw such an assumption but held that the evidence failed to prove that the whistle was not blown even though petitioner testified that he heard no whistle and "could" have heard a whistle had it been blown, and the Lower Court based its decision on the fact that petitioner's attention was directed to other matters ("getting off the track"), his hearing ability was decreased by other noises ("when his motor was not running he was 'grinding on the starter' "), and "there was independent positive evidence to the contrary" (R. 84).

II.

The Lower Court properly held that "there was no evidence that the alarm was not sounded" (R. 83). That conclusion of law was not contrary to the Illinois law nor the law of the Federal Courts as declared in the cases cited by petitioner on page 21 of his brief. In **Berg v. N. Y. C. R. Co.**, 391 Ill. 52, 62 N. E. 2d 676, l. c. 680, which case is cited by petitioner, the Supreme Court of Illinois said:

> "It is obvious that if a witness, without explanation of his evidence, testifies that he did not hear a bell or whistle, such testimony would have no value. To give it probative force, it must appear that the witness was in such proximity that he could have heard the sound had it been given, and that his attitude of attention was such that if the bell or whistle had sounded it would have attracted his attention."

In each of the federal cases cited by petitioner the same rule is set out—requiring that the circumstances of the witness' ability to hear and attentiveness be established **before** the negative evidence shall have any probative effect. As pointed out by the lower court, petitioner "had his attention directed to other matters—[and] his hearing ability decreased by other noises and—there was independent positive evidence" that the whistle was sounded (R. 84).

The burden was on petitioner to prove that the warning signal was not given, and as a matter of law he did not sustain that burden.

III.

(a)

Petitioner alleges that the lower court was incorrect in holding that there was no evidence to support a finding that defendant was guilty of wilful and wanton misconduct in the operation of the train (R. 22, 23). Petitioner's misconception of the law is based upon two erroneous conclusions drawn by him. First, he alleges that: "The evidence clearly shows that operators of the locomotive could have, by the exercise of ordinary care in maintaining a lookout, discovered the petitioner in his perilous position, and they could thereafter have slackened the speed of the locomotive to such an extent to have afforded

the petitioner an opportunity to have reached a place of safety" (Petitioner's Brief p. 23).

The only evidence set out by petitioner is that **after** application of the brakes in **emergency** a train traveling at 40 m. p. h. would be slowed to 20 m. p. h. within 400 feet and that within 600 feet the train would not be moving very fast (R. 50). That is not evidence showing that by exercise of ordinary care the train could have been slowed sufficiently to permit petitioner to escape. Such a conclusion ignores the fact that the operators were not required to see petitioner immediately as he came into view, the fact that the operators would have to take a moment or more to determine that an emergency existed, the fact that human reactions would take some seconds in which to transform into motion the decision of the brain, and the fact that the mechanical workings of the brakes also requires some time. All of that time is ignored by petitioner, and there is no evidence in the record to establish what those times would total. The lower court was correct in its statement that there was no evidence to show that the train could have been stopped or slowed sufficiently to avoid injury to petitioner (R. 84, 85).

Petitioner's second erroneous conclusion is one of law. Even if there was evidence to establish that the train could have been slowed sufficiently to permit plaintiff to escape, still the law of Illinois would not permit a finding of wilful and wanton misconduct on that alone, as petitioner urges. Such evidence would prove only negligence.

> "In order to constitute wilful and wanton misconduct the injury must either have been intentionally inflicted, or produced by acts so grossly negligent as to exhibit a reckless disregard for the safety of others." **Provenzano v. Illinois Central R. Co.**, 357 Ill. 192, 191 N. E. 287, l. c. 288.

"Negligence and wilful and wanton misconduct are not synonymous. As has been pertinently observed, 'Negligence and wilfulness are as unmixable as oil and water.' " **Gately v. Chicago and E. I. R. Co.** (C. C. A. 7), 138 F. 2d 222, l. c. 227.

Petitioner has cited (on page 22 of his brief) **Brown v. Ill. Term. R. R. Co.**, 319 Ill. 326, 150 N. E. 242, 244, and **Schneiderman v. Interstate Transit Lines, Inc.**, 394 Ill. 569, 69 N. E. 2d 293, 300. Those two cases do not support petitioner's theory of recovery in this case, because in each case the operator of the defendant's vehicle (train and bus, respectively) **admittedly saw** the plaintiff approaching a dangerous situation and then failed to do anything to avert the impending accident, which failure was held to constitute intentional disregard of a known duty. But in the case at bar there is no evidence that the operators of defendant's train saw plaintiff stalled on the crossing and then failed to act to avert a collision. If by the exercise of ordinary care they could have seen plaintiff when he first came into view, their failure to see him would constitute nothing more than negligence and could not be held to have been wanton and wilful misconduct. The Lower Court was correct in holding:

"There is no evidence to support a finding that the enginemen intentionally failed to stop the train before striking appellee, or that they failed through recklessness, as distinguished from ordinary care, to discover his peril in time to avoid the collision" (R. 83).

(b)

On page 23 of his brief petitioner says, "The evidence clearly showed that the respondent failed for more than five years to maintain the crossing flush with the rails as required by the statute (R. 32, 38). It intentionally disregarded a known duty which had been placed on it by

statute and was thus guilty of wilful and wanton misconduct." Petitioner does not explain how he concludes that there was an **intentional** disregard of a known duty, apparently because there can be no explanation. The record is void of any hint of intent on the part of defendant. There was no evidence of knowledge or notice of the defect in the crossing. Under petitioner's theory, the violation of any statute would constitute wilfulness and wantonness.

IV.

Throughout petitioner's argument relating to contributory negligence (Petitioner's Brief, pp. 24-26), he complains that the Lower Court held that petitioner was guilty of contributory negligence in attempting to remove his car from the crossing. That is not a correct analysis of the Court's opinion. The Lower Court found contributory negligence from plaintiff's failure to exercise care to look and listen for approaching trains and not from his attempt to remove his automobile from the crossing, and from applicable Illinois law the Lower Court found that:

> "A motorist stalled on a railroad track, where from past experience he knows a train is liable to approach at any moment, does not exercise care commensurate with his perilous situation unless he looks and listens for trains as often and as constantly as looking and listening are necessary to enable him to avoid injury" (R. 87).

The above quotation also answers petitioner's complaint that, "A reading of the opinion will obviously show that the test applied by the court was: 'If the petitioner could under any circumstances have avoided his injuries and he failed to do so, then he was guilty of contributory negligence as a matter of law' " (Petitioner's brief p. 25). The Lower Court analyzed the circumstances present and

declared what would be and would not be ordinary care under those circumstances. Petitioner has chosen to attack the Lower Court's method of explaining the law but has not questioned the law of the cases which support the decision and has not attempted to distinguish that law. That argument does not go to the merits of the case.

Petitioner alleges that his constitutional right of trial by jury has been denied him, because the verdict of twelve jurors and the judgment of the trial court was "brushed aside" by a divided opinion of the Lower Court when each must obey the rules laid down that, where reasonable minds might differ, the question is one for the jury (petitioner's brief pp. 24, 25). Petitioner's error is in his belief that the decision reversing the District Court was a decision of the individual judges, when in fact it was a decision of the Court of Appeals, a separate entity in itself. The Court and not the judges declared the **law** to be that reasonable minds could not differ on the question of contributory negligence. That declaration of **law** followed the decisions of the Illinois courts, and the dissent was a belief of an individual judge that the Illinois law would not hold that reasonable minds could not differ. This Court and its individual justices have performed the same acts of which petitioner complains. In the case of **Brady v. Southern Railway Company**, 320 U. S. 476, 88 L. ed. 239, this Court affirmed a judgment of the Supreme Court of North Carolina, which court had reversed a judgment for plaintiff obtained in the trial court. The question presented was whether or not there was evidence to support a finding that defendant was negligent. The majority opinion of this Court stated that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding * * *" l. c. U. S. 479, L. ed. 243.

The decision, after reviewing the facts, held that reasonable minds could not differ and held that defendant was not negligent. Four judges dissented, and the language of the dissenting opinion is very similar to that employed by the petitioner in his brief:

> "Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable." L. c. U. S. 484, 485, L. ed. 245.

Under the law of this land the decision concurred in by a majority of the individual judges became the decision of the Court and was binding on the litigants. If that were not so, a unanimous decision in all appellate courts would be required in order to upset a verdict of twelve jurors.

V.

Petitioner's testimony proved him guilty of contributory negligence as a matter of law. There is no evidence to prove that respondent was guilty of wilful and wanton misconduct; therefore petitioner is barred from recovery.

The accident occurred in Illinois and the substantive law of that state governs the case. The burden is on the plaintiff under Illinois law to prove that he was in the exercise of due care for his own safety, and failure to sustain that burden bars recovery; unless it is proved that the defendant was guilty of wilful and wanton misconduct. **Greenwald v. B. & O. R. Co.**, 332 Ill. 627, 164 N. E. 142.

The Court of Appeals, in the case at bar, decided against petitioner on both issues, and that decision was soundly based on the facts in evidence.

A.

Contributory Negligence.

When stalled in his automobile on the crossing, petitioner by his own admission could see 600 to 700 feet down the track (R. 21, 25, 26). It was undisputed that defendant's train approached the crossing at a sustained speed of 38 to 40 m. p. h. (R. 34, 45, 47). It was admitted that at a speed of 40 m. p. h. a train would travel 600 feet in 10 seconds (R. 28). Petitioner did not see the train until it was 150 feet from him (R. 27). Therefore, by Petitioner's own admission, Respondent's train traveled 450 to 550 feet in clear view of petitioner before he saw it. At 40 m. p. h. it would have taken the train a **minimum** of 7½ seconds to go that distance. During that time or for a longer time petitioner failed to make any attempt to determine whether or not he was in danger of being struck by a train (R. 27); yet he knew that sometimes a train would come along at that time (R. 26).

The courts of Illinois have declared that a railroad crossing is a dangerous place, and an automobilist must use care commensurate with the dangers.

> "The rule has long been settled in this state that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track, but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the

known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence.

"One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it."

Greenwald v. Baltimore & Ohio Railroad Co., 332 Ill. 627, 164 N. E. 142, l. c. 144.

To a like effect and based upon facts substantially similar to the case at bar are: **Gately v. Chicago and E. I. R. Co.** (C. C. A. 7), 138 F. 2d 222; **Provenzano v. Illinois Central R. Co.** (Ill. Sup.), 191 N. E. 287.

Petitioner alleged and submitted to the jury two theories of wilful and wanton misconduct—in failure to comply with the statute regarding maintenance of the crossing, and in operation of the train.

Assuming, as did the Lower Court, that the crossing did not comply with the requirements of the statute in that the roadway was not flush with the rails, still that is only proof of negligence and cannot be stretched to prove wilful and wanton misconduct. The record is void of any evidence of intent and is void of any evidence of notice to defendant that the crossing was defective. In fact it was

in fair compliance with the statute, because the defect which allegedly caused petitioner's automobile to stall was on that part of the crossing opposite the unpaved edge of the roadway, and the main traveled portion complied with the statute. There was no **gross** negligence or **reckless** disregard of the safety of plaintiff or others, as required in order to prove wilful and wanton misconduct.

> "In order to constitute wilful and wanton misconduct the injury must either have been intentionally inflicted, or produced by acts as grossly negligent as to exhibit a reckless disregard for the safety of others."
>
> **Provenzano v. Ill. Central R. Co.**, supra, 191 N. E. 287, 288.

Nor was there wilful and wanton misconduct in the operation of the train. There is no evidence that the trainmen saw petitioner stalled on the crossing and then failed to blow the whistle or slow the train; therefore, there is no evidence of intent.

On the question of wanton misconduct there are two matters for consideration. **First**, did the trainmen wantonly fail to blow the statutory warning signal? Under Point II of this argument we have discussed the ruling of the Lower Court to the effect that the evidence shows that the whistle was blown. In any event there is no probative evidence that it was not blown; therefore, there can be no recovery upon a theory that there was a wanton failure to blow the whistle. **Secondly**, did the trainmen wantonly fail to slow the train so as to allow petitioner to escape his automobile? Under Point III (a) of this brief we have discussed that question and have demonstrated that there is no evidence that the train could have been slowed sufficiently to permit petitioner to escape; and if there was such a failure, it would not be proof of wilful and wanton mis-

conduct. Therefore, petitioner cannot recover upon that theory, which leaves him with nothing to support him in his suit for damages. Petitioner's predicament was paralleled in the case of **Universal Concrete Pipe Co. v. Bassett** (Ohio Sup.), 200 N. E. 843, l. c. 845, 846, where that Court aptly observed:

> "Wantonness is a synonym for what is popularly known as 'cussedness,' and cussedness is a disposition to perversity. An act or omission does not become wanton at the whim or caprice of the pleader, any more than a threatened injury becomes irreparable simply because the pleader says so. Facts must be pleaded which reveal on their face the element of wantonness, and they must be proved as pleaded."

Defendant's engineer applied the brakes **as soon as he saw** that a collision was imminent (R. 45), but the accident was unavoidable. That is not evidence of a reckless disregard for the safety of others.

Finally, we have the proposition advanced by the Lower Court that even though the defendant might be found guilty of wilful and wanton misconduct, still the petitioner's disregard for his own safety was just as wanton and just as wilful, which would bar his recovery. **Restatement of Torts**, Vol. 2, § 503; **Schneiderman v. Interstate Transit Lines, Inc.**, 394 Ill. 569, 69 N. E. 2d 293.

CONCLUSION.

Petitioner's own testimony conclusively convicted him of contributory negligence as a matter of law. In order to prevent that from barring his recovery he had to prove that respondent was guilty of wilful and wanton misconduct. He had the foresight to plead such misconduct, but he failed to sustain the burden of proving it; therefore, he

was legally barred from effecting a recovery, and the Court of Appeals was legally correct in so holding.

Respectfully submitted,

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